

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE BANK OF IRON GATE, PLAINTIFF IN
ERROR,
v.
JAMES D. BRADY.

No. 175.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Aside from a matter of procedure, the question raised is the constitutionality of the Federal tax of 10 per cent on State bank notes "used for circulation and paid out," under section 3412, Revised Statutes, and section 19 of the act of February 8, 1875 (18 Stat., 311).

The action is one of trespass on the case, brought in the United States circuit court for the eastern district of Virginia, by the Bank of Iron Gate, a Virginia State bank, against James D. Brady, collector of internal revenue for the second Virginia district, to recover damages in the amount of \$6,000 because Brady, acting as such collector, in September, 1900, collected from the bank, by a threat of distraint, the sum of \$70, being a tax of 10 per cent assessed by the Commissioner of Internal Revenue on the amount of \$700 of "its circulating notes, payable to bearer and

intended to be used for circulation in ordinary business as currency," which the bank "made, issued, and paid out" between the months of November, 1899, and August, 1900. It is alleged that Brady knew that the acts of Congress imposing the tax were unconstitutional—

And he entered upon plaintiff's premises and levied on and seized its property, well knowing that he was doing unlawful acts, and he did the same maliciously and with the purpose and intention of doing a wanton injury to plaintiff and damaging its credit, so as to do it all the harm possible, and said unlawful act has damaged its credit and done it an irreparable injury, etc. (R., p. 2.)

A demurrer to the declaration was sustained, the circuit court holding that the acts of Congress referred to are constitutional and therefore the collector committed no trespass upon the rights of the plaintiff in compelling it to pay the tax. To review the judgment of the circuit court a writ of error was sued out from this court.

On January 17, 1900, the plaintiff in error suggested the death of Brady, and moved for an order of publication under rule 15 to bring in the representatives of the deceased defendant. This has been done.

I propose, very briefly, to submit two propositions:

(1) The action does not survive against the personal representatives of Brady.

(2) It is settled by the decisions of this court, beyond any need of argument, that the Federal tax of 10 per cent on the notes of State banks used and paid out as a circulating medium is valid and constitutional.

ARGUMENT.

I.

The action does not survive because, with the exception of the claim to recover back the amount of \$70 as taxes wrongfully collected, it is purely an action *ex delicto*, based on an alleged personal tort.

The bank sues for \$6,000 damages, because the United States collector, in the strict discharge of his duty, doing only what the law compelled him to do and nothing more, collected by legal process a tax of \$70, under a statute which has been in force for nearly forty years and has been sustained by repeated decisions of this court. If the amount of \$70 be regarded as essentially a claim arising *ex contractu* for taxes wrongfully collected which does not abate, the balance of the \$6,000 sued for is clearly a claim arising *ex delicto* for damages for a malicious injury to the credit of the bank, which does abate. Just how the collection of a tax of \$70, enforced by lawful means alone, could damage the credit of the bank to the extent of \$5,930 does not appear. Opposing counsel says that a jury might find that the injury done to the bank's credit was far more than \$2,000, but if it did would this court, or any court, permit such a verdict to stand, in view of the averments of the petition? It is not alleged that the collector did anything except employ the means provided by law, which it was his sworn duty to employ, in collecting this tax. In view of this fact, I submit that if the tax should be held unconstitutional no verdict for more than the amount

of the tax collected, with interest and costs, could be sustained by the courts.

But if a broader construction is to be given the averments of the declaration, and it is to be taken as containing a sufficient statement of a cause of action for wanton and malicious damage to the credit of the bank, to the extent of \$5,930, in collecting a tax of \$70 by lawful means, nevertheless the damage thus inflicted amounts only to a personal tort, and the maxim "*actio personalis*, etc.," applies. An injury done to the credit of the bank is not an injury to its personal property any more than an injury done to the reputation or credit of an individual is an injury to his personal estate. An action of slander or libel does not survive, whether the damage done be to the moral or business standing of the person who sues. The statute of Virginia which provides (section 2655) that "an action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away any goods, or any waste or destruction of, or damage to, any estate of or by his decedent," does not operate to take this claim for damages to the credit of the bank out of the general rule, because no goods of the bank were carried or taken away, and there was no waste or destruction or other damage to the estate of the bank. To bring a case within the statute there must be shown a damage to the property, real or personal, of the person aggrieved, and the damage must be direct and not consequential. If this were not so, then every injury by

which a person is subjected to pecuniary loss would, directly or indirectly, be a damage to his personal estate. (*Henshaw v. Miller*, 17 How., 212, 224; *Mum-power v. City of Bristol*, 94 Va., 739, 740.)

If the court holds that upon the facts stated in the declaration, either there is no valid claim for damage to the credit of the bank, or that such claim if it exists is purely tortious and abated with the death of Brady, then the circuit court had no jurisdiction, for the amount of \$2,000 was not involved in the case.

II.

The tax assailed was collected under the following provisions of law:

Section 3412, R. S. Every national banking association, State bank, or State banking association shall pay a tax of ten per centum on the amount of notes of any person, or of any State bank or State banking association, *used for circulation and paid out by them.*

Section 19 (act of February 8, 1875; 18 Stat., 311). That every person, firm, association other than national banking associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes *used for circulation and paid out by them.*

The constitutionality of this tax is assailed on two grounds:

First. Because the tax is a direct tax within the meaning of the income-tax cases.

Second. Because Congress has no power to provide a national currency, and, for the purpose of protecting it, to suppress the circulation of State-bank notes.

I shall consider these questions in their order.

(1)

The tax is not on State-bank notes held as property, but on the circulation of such notes as money, and is therefore not a direct tax.

In the leading case of *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869), Chief Justice Chase, speaking for the court, said (bottom p. 546):

The tax under consideration is *a tax on bank circulation* and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax.

Again, in respect to the contention that the tax is one on a franchise granted by a State, which Congress can not tax, he says (p. 547):

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets, and it can not be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the

railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them, and both, as we think, may properly be made contributory to the public revenue.

Mr. Justice Nelson in his dissenting opinion in this case, says (bottom p. 554):

It will be observed, the tax of 10 per centum upon the bills in circulation is *not a tax on the property of the institutions*. The bills in circulation are not the property but the debts of the bank, and in their account of debits and credits are placed to the debit side.

* * * * *

The imposition upon the banks *can not be upheld as a tax upon property; neither could it have been so intended*. It is simply a mode by which the powers or faculties of the States, to incorporate banks, are subjected to taxation, and which, if maintainable, may annihilate those powers.

In the case of *National Bank v. United States*, 101 U. S., 1 (1879), the decision in the *Veazie Bank* case was unanimously approved and followed by this court, Chief Justice Waite delivering the opinion, and saying (p. 6):

The tax thus laid is not on the obligation, *but on its use in a particular way*. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but can not, against the will of

Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation was no doubt intended to destroy the use, but that, as has just been seen, Congress had the power to do.

The power and purpose of Congress in levying this tax was further confirmed and defined in the case of *Hollister v. Mercantile Institution*, 111 U. S., 62 (1884), in which the court held that an order for \$5 in merchandise was not a note within the meaning of the law under consideration. Chief Justice Waite, who delivered the opinion of the court, after reviewing the legislation on the subject, says (p. 65):

We are led to the conclusion that only such notes as are in law negotiable, so as to carry title in their circulation from hand to hand, are the subjects of taxation under the statute. It was, no doubt, the purpose of Congress, in imposing this tax, to provide against competition with the established national currency *for circulation as money*, but as it was not likely that obligations payable in anything else than money would pass beyond a limited neighborhood, no attention was given to such issues as affecting the volume of the currency, or its circulating value.

The court will observe that the exaction is not a tax on the State bank notes, when held or used as property,

but only on such notes when "used for circulation and paid out" by the bank made liable to the tax. The tax was directed against a particular transaction, to wit, the paying out of State bank notes by a bank for use as a circulating medium in competition with national currency. Now, it was not held in the income-tax cases that a tax on a transaction or movement, or use of a thing, is a direct tax. Before the decision of these cases the trend of authorities limited the meaning of a direct tax, as used in the Constitution, to a capitation tax and a tax on land. On the original submission of these cases the court held that a tax on the rents or incomes of land is a tax on the land itself, and therefore a direct tax within the meaning of the Constitution. On the rehearing the court extended its definition of a direct tax so as to include a tax levied on personal property or the income thereof. Such is the extent to which the court went. (*Pollock v. Farmers' Loan and Trust Company*, 157 U. S., 429; 158 U. S., 601.)

State bank notes in the hands of the bank which issues them can hardly be said to be property; as pointed out by Mr. Justice Nelson they are obligations, promises to pay. But if deemed to be property, they are not taxed as property or when held as property or when disposed of as property. They are only taxed when "used for circulation and paid out" for that purpose. A tax upon a use such as this is not a direct tax, because one can escape the tax by avoiding the use. A bank or person who holds the notes as property may collect them, and thus obtain the full benefit of

them as property without paying any tax. But if the bank uses them for a purpose reserved by Congress for the national currency, it must pay the tax imposed upon such use.

(2)

The constitutional authority of Congress to provide a currency for the whole country, and to that end to restrain the circulation as money of any notes not issued under its own authority, is now firmly established by the decisions of this court.

After simply assuming that under the decisions in the income-tax cases the court must hold that the tax upon the use of State-bank notes as a circulating medium is a direct tax, and thus overrule the decisions in the *Veazie Bank* and succeeding cases cited above, counsel devotes his brief to an elaborate discussion of the question whether Congress, under the Constitution, has power to provide a national currency, and to protect it by suppressing the circulation as money of State-bank notes, going into a review of the history of banking and currency from the beginning of the Government. I am not going to follow counsel in a discussion of this question historically or upon principle. I consider it settled. I will not discuss it as an open question. I will not by so discussing it acquiesce in counsel's assertion that all that has been done by Congress and by the courts since 1861 in providing this country with a currency of coin and paper, every dollar of which has back of it the National Government, and every dollar of which is as good as gold, "was inspired by the necessities the Government was

supposed to be under in the emergencies of war" (brief, page 29), and is therefore lightly to be brushed aside.

No doubt the greenbacks were issued and made legal tender, and the national banks organized and authorized to issue their notes, for the purpose of helping the Government out during the civil war, but the constitutionality of the measures establishing and protecting our national system of currency was discussed and decided time and again long after the war was over. These measures have become a part of the fundamental law of the land. I would as soon think of offering to reopen *Gibbons v. Ogden* or *McCulloch v. Maryland* as of presuming to discuss their validity on principle. In the conduct of government and the administration of law there comes a time when a principle or a policy is so far fixed and settled that it is the part of wisdom to refrain from discussing or defending it.

In the *Veazie Bank case* (8 Wall., 533) Chief Justice Chase, after giving the reasons of the court for holding that this tax is not a direct tax, discusses and upholds (pp. 548, 549) the wisdom and power of Congress in providing a national currency and in protecting it by this tax, and concludes thus (p. 549):

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it can not be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign

coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end *Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority.* Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

I have already cited the opinions of the court in *National Bank v. United States* (Chief Justice Waite) and in *Hollister v. Mercantile Institution* (Chief Justice Waite), following the *Veazie Bank* case and explicitly upholding the authority of Congress to provide a stable and uniform national currency, and to protect it by this tax, which was designed to suppress the circulation as money of notes which do not have back of them the faith and credit of the nation.

In the *Head Money* cases, 112 U. S., 580 (1884), Mr. Justice Miller, speaking for the court, said (p. 596):

In the case of *Veazie Bank v. Fenno* (8 Wall., 533, 549) the enormous tax of 8 (*sic*) per cent per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, *was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks.*

The case of *Veazie Bank v. Fenno* is cited with approval as weighty authority in those cases which finally determined the constitutionality of the legal-tender provision of the national-currency act.

In the *Legal Tender cases* (12 Wall., 457), Mr. Justice Strong, speaking for the court, said (p. 543):

The case of *Veazie Bank v. Fenno* presents a suggestive illustration. There a tax of 10 per cent on State-bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but *as an instrument to put out of existence such a circulation in competition with notes issued by the Government*. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States notes, or notes of national banks, and that it can not be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this Government to emit bills of credit, to make them receivable in payment of debts to itself, to fit them for use by those who see fit to use them in all the transactions of commerce, to make them a currency uniform in value and description and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if State-bank notes can be taxed out of existence for the purpose of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

Again, in *Juilliard v. Greenman* (110 U. S., 421), the court, speaking by Mr. Justice Gray, said (p. 445):

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank v. Fenno (8 Wall., 533, 548), Chief Justice Chase, in delivering the opinion of the court, said: "It can not be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the Government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." *Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of 10 per cent upon the amount of such notes so paid out. (Veazie Bank v. Fenno, above cited; National Bank v. United States, 101 U. S., 1.)* The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it can not be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end,

Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempt to secure a sound and uniform currency for the country must be futile." (8 Wall., 549; 101 U. S., 6.)

In view of these decisions, sustaining in amplest measure the power of Congress to provide a currency for the whole country and to prevent the circulation as money of any notes not issued under its authority, I shall not enter into a discussion of this question upon principle. What the great men of antebellum days said and thought on the subject of banking and currency is interesting as history, but hardly valuable as authority in the light of the doctrines definitively settled by this court since they passed from the scene.

JOHN K. RICHARDS,
Solicitor-General.

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